88-1407

Supreme Court, U.S.
FILED
FEB 24 1989
JOSEPH F. SPANIOL, JR.
CLERK

ORAL ARGUMENT REQUESTED

IN THE

Supreme Court of the United States

No. A-553

BERNARD J. DOLENZ,

Appellant,

V.

STUART YACHT BUILDERS, INC.,

Appellee.

PETITION FOR CERTIORARI

Bernard J. Dolenz
6102 Swiss Avenue
Dallas, Texas 75214

Pro Se

PREFACE

A Petition for Writ of Mandamus or a Writ of Prohibition was docketed in this Court on May 2, 1988 as No. 88-971. No ruling has been rendered. Associate Justice Byron R. White gave an Order Extending Time to File a Petition for Writ of Certiorari to February 26, 1989, dated January 11, 19[illegible].

QUESTIONS PRESENTED

I. THE TRIAL COURT LACKS JURISDICTION AND THE CASE SHOULD BE DISMISSED.

II. THE TRIAL COURT ERRED IN ALLOWING THE DEFENDANT ARIES STAR TREK TO BE WITHOUT COUNSEL BY DISMISSING COUNSEL AND REFUSING TO CONTINUE THE CASE, PLACING THE DEFENDANT VESSEL IN A DEFAULT POSITION.

III. THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING THE MOTION TO EXTEND TIME TO APPEAL.

IV. THE APPEALS COURT ERRED AS IT HAD JURISDICTION, EVEN THOUGH THE TRIAL COURT DENIED THE MOTION FOR EXTENTION TO APPEAL.

V. THE APPEALS COURT ERRED IN HOLDING THAT THE NOTICE OF THE APPEAL WAS UNTIMELY AS THERE WERE CIRCUMSTANCES THAT PREVENTED THE TIMELY APPEAL UNDER THE CIRCUMSTANCES.

VI.THE TRIAL COURT ABUSED ITS DISCRETION IN NOT RELEASING THE DEFENDANT AIRES STAR TREK AS FUNDS HAVE BEEN TENDERED TO THE COURT FOR ITS RELEASE.

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LIST OF PARTIES

The parties to the proceedings below was the unfinished vessel "Aries Star Trek", enrollment No. 555798 as Defendant, and Stuart Yacht Builders, Inc. was the Plaintiff. This was an in rem proceeding. Melissa Keyes was part owner in the vessel and transferred all of her interests to Bernard Dolenz. The Court and counsel for Stuart Yacht Builders, Ins. knew on March 16, 1987 through sworn testimony that Bernard Dolenz was the owner of the vessel, and yet the Court refused Bernard Dolenz, as owner, the right to defend the vessel, and failed to send notices of activity regarding the defendant vessel, even though repeatedly requested to do so. The Court has never allowed even a hearing before the Court, even though repeatedly requested.

OPINIONS BELOW

This unfinished vessel was arrested on July 10, 1986, and was tried on March 16, 1987 in a default posture. The Court had allowed the vessel's attorney to withdraw from the case on the morning of trial, refusing a Continuance, even though the Court a couple of days earlier had denied the Defendant's counsel his Motion to Withdraw as counsel for the Defendant.

Jurisdiction was challenged by Bernard Dolenz on March 18, 1987 when the Court refused to return his phone calls on March 16, 1987 when the Defendant's attorney abandoned the representation of the vessel. Eventually, after many Motions were before the Court, the Court denied Dolenz's Motion to Dismiss for Lack of Jurisdiction, for Intervention,

and for Reconsideration on September 25, 1987.

A Mandamus action was initiated to the Eleventh Circuit primarily regarding the jurisdictional issue and the Eleventh Circuit denied the Petition for the Writ and denied its Rehearing January 27, 1988.

When the Mandamus action failed, the Trial Court entered a final judgment February 16, 1988 with the Clerk not circulating that notice of judgment to Bernard Dolenz. Dolenz had made many phone calls to the Clerk, and had made many trips regarding the file, and had assurances from the Clerk because of his almost seeming nuisance behavior that he would be kept informed of any activity by the Clerk.

Upon inquiry, Dolenz was shocked to learn that a Judgment had been entered February 16, 1988, and filed papers to vacate that judgment on April 11, 1988, and filed a Motion to Extend Time to Appeal, which was denied by the Court April 22, 1988. An appeal was made to the Eleventh Circuit regarding the District Court's abuse of discretion in not granting the extention of time for a timely appeal because of the circumstances of receiving no notice and other factors for excuseable neglect. The Eleventh Circuit denied jurisdiction of the case even on rehearing September 29, 1988.

It is from the unnoticed judgment, the denial of a Writ of Mandamus and a Writ of Prohibition and the denial of a full appeal to the Eleventh Circuit that the owner of the Defendant vessel is appealing and trying to perfect his Writ of Certiorari.

JURISDICTION

This Court has jurisdiction pursuant to 28 USCA Section 1254.

The Plaintiff came to the Admiralty in the District Court for the Southern District of Florida pursuant to 28 USC Section 1333 and 46 USC Section 971. The owner contends that the Plaintiff invoked the jurisdiction improperly as the vessel was never finished, commissioned, and was still under construction.

The decrees to be reviewed include the Order of the District Court denying the Motion to Dismiss for Lack of Jurisdiction, for Intervention, for Reconsideration on September 25, 1987; the Eleventh Circuit decision Denying Motion for Rehearing on Petition for Writ of Prohibition and/or Writ of Mandamus on

January 27, 1988; the Judgment rendered by the District Court on February 16, 1988; the Order of the District Court Denying Petitioner's Motion to Substitute Parties and Motion to Extend Time to Appeal on April 22, 1988; and the Decision of the Eleventh Circuit Denying the Motion for Rehearing regarding perfecting the appeal on September 29, 1988.

Associate Justice Byron R. White gave an Order Extending Time to File a Petition for Writ of Certiorari to February 26, 1989, dated January 11, 1989

The Appellant herein seeks to invoke the jurisdiction of this Court pursuant to 28 USC Section 1651(a) for the review of some or all of the above stated orders and decisions.

STATUTES INVOLVED

28 U.S.C. §1333.Admiralty, Maritime and Prize Cases

> The district court shall have original jurisdiction, exclusive of the courts of the states, of:
>
> (1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.

46 U.S.C. §971. Persons entitled to lien

> Any person furnishing repairs, supplies, towage, use of dry dock or marine railway, or other necessaries, to any vessel, whether foreign or domestic, upon the order of the owner of such vessel, or of a person authorized by the owner, shall have a maritime lien on the vessel, which may be enforced by suit in rem, and it shall not be necessary to allege or prove that credit was given to the vessel.

The Appellant contends these Statutes relied upon by Appellee do not apply as the Defendant vessel was never finished, was under construction, and was never finished.

See Appendix 101 - 107.

STATEMENT OF CASE

The Defendant Aries Star Trek had its wood infrastructure built in Tai Pai in 1968, being freightered to this country to have it finished. The boat owner died, and it remained in an estate for many years being moored in a river. It was hauled from the river after many years to have it finished and commissioned. Stuart Yacht Builders, Inc. dry-docked the vessel, and when work was not done satisfactorily and with exorbitant charges, the Plaintiff sued in Admiralty in rem. The vessel was arrested July 10, 1986 with a notation "... vessel is incomplete, under constuction, and empty of equipment".

Because of a threat, the Plaintiff's owner (Greg Burdick) imputed this unsubstantiated and purported threat to

the owners of the vessel. This alarmed the attorney who was hired to defend the vessel to where he wanted to withdraw as counsel for the Defendant, which was denied March 12, 1987. On March 16, 1987, the attorney was granted his Motion to Withdraw as Counsel and a desire to continue the case was denied placing the vessel in a default posture. Melissa Keyes represented to the Court that Bernard Dolenz had an ownership interest in the vessel prior to March 16, 1987, and indicated that she had transferred her remaining interest to Bernard Dolenz, although such interest had not been formally delivered to Dolenz. The Court would not allow a continuance, and refused to return calls from Dolenz on March 16, 1987 when counsel for the Aries Star Trek had abandoned its defense.

Subsequently, Dolenz filed notices on

Intervention, his claim of ownership to the vessel, and his Motion to Dismiss for Lack of Jurisdiction. The Court remained insensitive to these Motions for over six (6) months, and then denied the Motions to Dismiss for Lack of Jurisdiction, for Intervention, and for Reconsideration on September 25, 1987.

A Petition for Writ of Prohibition and/or Writ of Mandamus was taken to the Eleventh Circuit, which was denied at rehearing on January 27, 1988. The Trial Court then entered a Final Judgment on February 16, 1988. The Clerk did not send a copy of this to Bernard Dolenz, even though the Court knew that he was the owner through testimony and documentation. The Clerk had assured Dolenz that she would keep him posted following several phone calls and trips regarding this case. Inquiry on April 6,

1988 revealed that a judgment had been entered. A Motion to Extend Time for Appeal was sent April 7, 1988 pursuant to FRAP 4(a) and case law dealing with Rule 77(d) and 60(b) before the 60 days would run. A Notice to Appeal was filed April 14, 1988. The Trial Court judge denied the Motion to Extend Time to Appeal on April 22, 1988.

Dolenz filed a Notice of Appeal with the Eleventh Circuit, which was dismissed for lack of jurisdiction because the notice was untimely filed, and a rehearing was denied on September 29, 1988. Dolenz contends that he complied with the Eleventh Circuit's case, TESSMER V. WALKER 833 F2d 935, as he did everything reasonable under the circumstances to be kept informed of the case short of groveling and living at the Ft. Lauderdale Federal Courthouse. The Clerk

indicated that she would keep Dolenz posted as he had made a nuisance by making several phone calls and visits to review the file.

Judge Zloch would never give a hearing throughout all of this paperwork to Dolenz; he even denied a Motion for Hearing.

A check for $45,995.78 was tendered to the Clerk to have the vessel released June 30, 1988 pursuant to Rule 4 (4)(f). Earlier repeated requests for the judgment payoff amounts from Clerk and U.S. Marshall remained unanswered.

Because repeated calls to the Clerk regarding the release of the vessel since money had been tendered and calls to Judge Zloch's chambers resultd in no action or order, a FRAP 8 Motion was

requested of the Eleventh Circuit on July 14, 1988. To date, neither Judge Zloch nor the Eleventh Circuit will give a release of the vessel; nor can I obtain information for its release. In the meantime, the vessel is deteriorating, which had been called to the Zloch Court and Eleventh Circuit's attention on several occasions. Neither Court have given rulings even though requested.

REASONS FOR GRANTING THE WRIT

I. THE TRIAL COURT LACKS JURISDICTION AND THE CASE SHOULD BE DISMISSED

Lack of jurisdiction is plain, and it is indeed strange that with this evidence, the Zloch Court gave Findings that were contrary to these facts:

(1) The U. S. Marshall upon arresting the vessel 7/10/86 stated: "...Vessel is incomplete, under construction, and empty of equipment..." P-49, Appendix.

(2) Ray Seese, Plaintiff's expert and Marine surveyer states that the vessel has never been completely finished or commissioned... P-42, Appendix.

(3) Statements of Burdick in a local newspaper article that the Boat is about 70% completed. P-43, Appendix.

These facts were pointed out to the Court with Motions to dismiss because of plain lack of an underpinning for a maritime

contract March 18, April 4, April 18, and April 9, 1988. This makes one wonder who authored the judgment.

The boat was never launched. The infrastructure was built in Taipei in 1968 and freightered to this country, with the intent to finish it here. The owner died, with the unfinished boat being moored in a river for over a dozen years while in an estate. The boat was moved to Stuart Yacht for work to begin its completion and launching. P-43, Appendix.

A boat that has never been completely finished or commissioned, as Ray Seese points out in his survey, lacks Admiralty jurisdiction. See Memorandum of Law, P-101 et seq.

II. THE ZLOCH COURT ERRED IN ALLOWING THE DEFENDANT ARIES STAR TREK TO BE WITHOUT COUNSEL BY DISMISSING COUNSEL AND

REFUSING TO CONTINUE THE CASE, PLACING THE DEFENDANT VESSEL IN A DEFAULT POSITIION.

When the boat was arrested, Attorney Lyman Reynolds was hired to defend the vessel. Melissa Keyes told the Court that Bernard Dolenz was a partner with her in the boat, had an interest in it while Lyman Reynolds was defending the vessel. (Appendix P-77). Reynolds tried to withdraw as counsel upon learning that Burdick received a unsubstantiated purported threat, which Burdick was imputing to the vessel. In docket P-1, Motion to withdraw as counsel and Motion to continue were both denied March 12. On the 16th, the Court allowed Reynolds to withdraw as counsel, and refused to continue the case or even a suggestion to continue (P-1, docket).

Several phone calls were placed to Judge

Zloch that morning by Bernard Dolenz (Affidavit of Bernard Dolenz attached to Motion to Dismiss; Motion to Reconsider March 18, 1987; P-10 Appendix; Affidavit, P-93), Why the Court refused to return phone calls to Dolenz and with Lyman Reynolds being allowed to abandon a case for which he was hired without a continuance seems abhorant to any system of justice, particularly when communications were made to the Court. Contrary to the statement on P-89 by the Court, there was contact with the Judge's clerk about wanting a continance and a conversation with the judge. This request was not honored. Melissa Keyes, not being an attorney, told the Court that Dolenz was trying to call you (Zloch) this morning (P-79), was in Court in Texas (P-79), and was hoping for a continuance so that he could properly prepare the case (P-82) because Reynolds

wanted to abandon the case, and did. From an interest standpoint, the Court knew Dolenz had part interest several months earlier, and Reynolds was denied his motion to withdraw as counsel a couple days earlier. Reynolds was hired to represent the Aries Star Trek, the Defendant. When Melissa Keyes asssigned the remaining interest in the boat, giving full ownership to Dolenz, what difference did this make on defending the vessel? Furthermore, Melissa Keyes still had title to her remaining interest until such time as the assignment was DELIVERED. She had standing to continue, and Mr. Perry misrepresented to the Court that she lacked standing (P-83). The Court should either have allowed Mr. Reynolds to defend the vessel with the purported threat that Mr. Burdick alleged, or continue the case so that the defendant vessel could get substitute

counsel.

The issue of Assignments is covered on P-101.

In VILLEGAS V. CARTER, 711 SW2d 624 (Tex 1986) the trial court abused its discretion in denying a motion to continuance after allowing the attorney to voluntarily withdraw two days before trial where the client was not negligenet or at fault in causing his attorney's withdrawal, the client had too short a time in which to find a new attorney and to have that attorney investigate the case and prepare for trial.

Similarly a trial court abused its discretion by denying continuance, and client was prejudiced thereby, where client had little or no advance notice that her counsel would withdraw on morning of trial of a complex matter. MILLS V MILLS, 232 Va 94, 348 SE2d 250, 3 VLR 549. Most jurisdictions have similar

case law. 17 Am. Jur 2d 130.

III. THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING THE MOTION TO EXTEND TIME TO APPEAL

Argument is given on P-124 et seq and will not be repeated here.

IV.THE APPEALS COURT ERRED AS IT HAD JURISDICTION, EVEN THOUGH THE TRIAL COURT DENIED THE MOTION FOR EXTENTION TO APPEAL.

See page 128 for argument.

V. THE APPEALS COURT ERRED IN HOLDING THAT THE NOTICE OF THE APPEAL WAS UNTIMELY AS THERE WERE CIRCUMSTANCES THAT PREVENTED THE TIMELY APPEAL UNDER THE CIRCUMSTANCES.

See page 128 et seq for argument.

VI.THE TRIAL COURT ABUSED ITS DISCRETION

IN NOT RELEASING THE DEFENDANT AIRES STAR TREK AS FUNDS HAVE BEEN TENDERED TO THE COURT FOR ITS RELEASE.

Two motions are before this Court for the release of the defendant. One sent June 30, 1988, and the second September 27, 1988. The Court has been tendered $44,995.78 dated 6/30/88 and has possession of the check. In spite of authority of Rule E, 4(f) for the release from arrest, the Court refuses to release the boat or give a ruling on why not. The 11th Circuit has had a FRAP 8 Motion sent July 14, 1988 because of the insensitivity of the Zlock Court, and likewise there has been no reponse or ruling from that Court.

CONCLUSION

Appellant prays that this Court grant the Petition for Certiorari; that this case be dismissed for lack of jurisdiction; alternatively that this case be remanded for trial; that Rule 11 Sanctions be imposed on the Plaintiff as it persisted in prosecuting this case, knowing that the vessel was unfinished, under construction, and never commissioned; and for general relief.

Respectfully submitted,

Bernard J. Dolenz

CERTIFICATE OF SERVICE

Three copies of the foregoing instrument were sent by regular mail to Steven Perry, Plaintiff's Attorney, P. O. Drawer 24, Stuart, FL 33497-0024 on this the ___th day of February, 1989.